UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIL FRLUCKAJ, Petitioner, v. L. SMALL, Warden, Respondent.	NO. ED CV 08-01019-MMM(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 30, 2009

Margaret M. Morrow

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AMIL FRLUCKAJ, Petitioner, v. L. SMALL, Warden, Respondent.	NO. ED CV 08-1019-MMM(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on July 29, 2008, accompanied by a Memorandum of Points and Authorities ("Pet. Mem.") and Exhibits ("Pet. Ex."). Respondent filed a Motion to Dismiss on October 20, 2008, alleging

that Petitioner had not exhausted all of his claims. Petitioner filed an Opposition to the Motion to Dismiss on November 5, 2008, contending that Petitioner's claims were exhausted and that, in the alternative, Petitioner was entitled to a stay pursuant to Rhines v. Weber, 544 U.S. 269 (2005).

On February 17, 2009, the Court issued a Memorandum and Order deeming unexhausted Petitioner's claim that trial counsel ineffectively conceded Petitioner's guilt on the kidnapping charge in closing argument. In the same Memorandum and Order, the Court denied Petitioner's request for a stay. The Court ordered Petitioner to file, within thirty days of the date of the Memorandum and Order, either a request to amend the Petition to delete and abandon Petitioner's unexhausted claim or a request to dismiss the entire Petition without prejudice. On March 3, 2009, Petitioner filed a "Request to Amend the Petition to Delete and Abandon Petitioner's Unexhausted Claim." On March 4, 2009, the Court issued a Minute Order deeming the Petition to be amended to delete and abandon Petitioner's unexhausted claim and ordering Respondent to file an Answer to the Petition as amended.

On April 27, 2009, Respondent filed an Answer. On June 8, 2009, Petitioner filed a Reply, accompanied by a Memorandum of Points and Authorities ("Reply Mem.").

BACKGROUND

Between March 19, 2002 and March 31, 2002, in Riverside County,

Petitioner robbed a Radio Shack, a Circle K, an ARCO gas station convenience store, a Thrifty gas station convenience store and a 7-Eleven (Reporter's Transcript ["R.T."] 17-36, 93-108, 111-15, 119-32, 168-85, 191-208). Videotapes from surveillance cameras at each location showed Petitioner committing each robbery (R.T. 33-35, 104-07, 128-30, 181-85, 205-07). Petitioner's fingerprints matched those found at the Radio Shack (R.T. 48-52, 71-75, 90-92). Petitioner admitted to investigators that Petitioner had committed the robberies, but said he had used a pellet gun (R.T. 238, 256, 260; Clerk's Transcript ["C.T."] 119-22, 131-32, 136-37, 140-41, 150). Petitioner's confederate Ernesto Amaya told investigators that Amaya accompanied Petitioner while Petitioner committed the Circle K, ARCO and 7-Eleven robberies (R.T. 249-52). Amaya pled guilty to the four robberies (R.T. 145, 155-58).

On May 31, 2003, Petitioner approached Asad Milbes in a Penny Mart parking lot in Rubidoux, California (R.T. 262-69). Petitioner pulled a gun from his waistband and demanded money (R.T. 270). When Milbes said he had no money, Petitioner poked the side of Milbes' head with the nozzle of the gun and said "Give me the money or I'll shoot you" (R.T. 271-72). When Milbes gave Petitioner money from Milbes' wallet, Petitioner said that he had been following Milbes and knew Milbes had gone to a bank (R.T. 272-73). Petitioner entered Milbes' car and ordered Milbes to drive to an ATM and withdraw money (R.T. 273-75). Milbes drove to a Washington Mutual Bank, but there were many cars in the drive-through, so Petitioner told Milbes to ask someone where a Bank of America was located (R.T. 277). Milbes asked a woman for the location of a Bank of America (R.T. 277-78).

Petitioner ordered Milbes to drive to the Bank of America, with the gun pointed in Milbes' side (R.T. 277). Petitioner told Milbes that if Milbes tried anything Petitioner would shoot Milbes (R.T. 276-79). At the Bank of America ATM, Milbes withdrew $700, but Petitioner, dissatisfied with the amount, demanded that Milbes use his credit cards to withdraw more money (R.T. 280-83). When Milbes said he did not know the PIN numbers, Petitioner instructed Milbes to drive to a jewelry store and use the credit cards to buy jewelry for Petitioner (R.T. 283).

Milbes drove to the Tyler Mall in Riverside (R.T. 279-86). Milbes used back streets, and the trip took 20 to 25 minutes (R.T. 279). Petitioner held the gun to Milbes' side "on and off" during the ride (R.T. 279). It was a Saturday, and the mall was very busy (R.T. 286, 291). Milbes parked in a handicapped parking spot, thinking that a police officer might see Milbes doing so (R.T. 287). Petitioner walked into the mall behind Milbes (R.T. 288). Petitioner repeatedly warned Milbes that Petitioner would shoot Milbes if Milbes tried something (R.T. 288).

The two visited five or six jewelry stores (R.T. 289). Petitioner found something he liked, but Milbes said the price exceeded Milbes' credit limit (R.T. 290). In an attempt to get away, Milbes told Petitioner that Milbes needed to use the bathroom (R.T. 291). At an elevator on the second floor, Petitioner walked in front of Milbes for the first time (R.T. 292). Seizing this opportunity, Milbes hit Petitioner and tried unsuccessfully to push Petitioner over a railing (R.T. 293). Milbes then "bear-hugged" Petitioner and the

two fell to the ground (R.T. 293-96). Milbes yelled that Petitioner had a gun and was trying to shoot him (Milbes) (R.T. 295-96). Milbes had his hands underneath Petitioner fighting for the gun (R.T. 296). A passerby and an off-duty deputy sheriff assisted Milbes in overpowering Petitioner (R.T. 297-99, 326-34). The deputy took custody of the gun, which was a Smith & Wesson revolver containing three live rounds (R.T. 330, 334). Officers took from Petitioner the $700 Milbes had withdrawn from the ATM and returned the money to Milbes (R.T. 304). Petitioner was taken from the scene on a stretcher (R.T. 304).

At trial, Petitioner's counsel conceded that Petitioner had committed the March robberies, but argued that the evidence did not support the allegations that Petitioner had personally used a firearm in committing those robberies (R.T. 433-35, 436-40). Counsel conceded that Petitioner had kidnapped and robbed Milbes using a "real gun," but argued that Petitioner had not committed kidnapping for the purpose of robbery (R.T. 442).

A jury found Petitioner guilty of kidnapping for robbery, two counts of first degree robbery (7-Eleven robbery and robbery of Milbes), four counts of second degree robbery (Radio Shack, Circle K, ARCO, and Thrifty), and one count of assault with a firearm on Milbes (R.T. 504-09). The jury hung on the allegations that Petitioner had personally used a firearm in the March robberies, and the court dismissed those allegations at sentencing (R.T. 500, 515). The jury found true the allegations that Petitioner had personally used a firearm in the commission of the Milbes robbery, the kidnapping for

robbery, and the aggravated assault (R.T. 504-09). The court found true the allegation that Petitioner committed the Milbes offenses while released on bail (R.T. 511). Petitioner received a sentence of 23 years and four months and a consecutive term of seven years to life (R.T. 516-20).

Petitioner appealed, alleging that his sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000) ("Apprendi"), and Blakely v. Washington, 542 U.S. 296 (2004) ("Blakely"). On June 8, 2006, the Court of Appeal issued a decision modifying the judgment to provide that the sentence on the kidnapping for robbery count was life with the possibility of parole, but otherwise affirming the judgment (Pet. Ex. A, pp. 5-6; People v. Friuckaj, 2006 WL 1555936, at *2 (Cal. Ct. App. 4th Dist. June 8, 2006). On August 16, 2006, the California Supreme Court denied Petitioner's petition for review "without prejudice to any relief to which defendant might be entitled after the United States Supreme Court determines in Cunningham v. California, No. 05-6551, the effect of Blakely v. Washington (2004) 542 U.S. 296 and United States v. Booker (2005) 543 U.S. 220, on California law" (Petition, Ex. B).

On October 18, 2006, Petitioner was resentenced on the kidnapping for robbery count to a consecutive term of life with the possibility of parole (Pet. Ex. C).

Petitioner filed a habeas corpus petition in the Riverside County Superior Court, which that Court denied on October 10, 2007 (Pet. Ex. D; Reply Ex. P; Respondent's Lodgment 1). Petitioner filed a

habeas corpus petition in the California Court of Appeal, which that Court denied summarily (Pet. Ex. E; Respondent's Lodgments 2, 3). Petitioner filed a habeas corpus petition in the California Supreme Court, which that Court denied on July 9, 2008 "without prejudice to any relief to which petitioner might be entitled after this court decides In re Gomez, S155425: whether a habeas petitioner whose conviction became final after Blakely v. Washington (2004) 542 U.S. 296 but before Cunningham v. California (2007) 549 U.S. 270, is entitled to the benefit of the high court's decision in Blakely" (Pet. Exs. F, I, J).[1]

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court allegedly violated Petitioner's rights under Apprendi, Blakely and Cunningham v. California, 549 U.S. 270 (2007) ("Cunningham") by sentencing Petitioner to an upper term and by imposing a consecutive sentence; and

2. Petitioner's trial counsel allegedly rendered ineffective assistance, assertedly by: (a) failing to investigate and present the testimony of Omer Gilic; (b) failing to request a voluntary intoxication instruction; (c) failing to investigate and present

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[1] On February 2, 2009, the California Supreme Court issued its decision in In re Gomez, 45 Cal. 4th 650, 653, 88 Cal. Rptr. 3d 177, 199 P.3d 574 (2009), holding that Cunningham "applies on collateral review to a judgment that became final before *Cunningham* was decided but after *Blakely*."

evidence of Petitioner's alleged voluntary intoxication at trial and at sentencing; (d) failing to deliver an opening statement outlining the defense strategy; and (e) conceding Petitioner's guilt on the robbery charges in closing argument, allegedly without consulting Petitioner.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), signed into law April 24, 1996, a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); see also Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts. . . materially

indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts).

A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Davis v. Woodford, 384 F.3d 629, 637-38 (9th Cir. 2004).

In applying these standards, this Court looks to the last reasoned state court decision. See Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). To the extent no such reasoned opinion exists, as where a state court rejected a claim in an unreasoned order, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

DISCUSSION

I. Petitioner's Challenges to His Sentence Do Not Merit Habeas Relief.

A. Background

In Apprendi, the United States Supreme Court held that, regardless of its label as a "sentencing factor," any fact other than the fact of a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be "proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. In Blakely, the Supreme Court held that the "statutory maximum" for Apprendi purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . ." Blakely, 542 U.S. at 303 (original emphasis).

At sentencing, the court selected the robbery of Milbes as the principal term and imposed the upper term because of the "threat of

great violence and bodily harm" (R.T. 516, 518). The court imposed a consecutive ten-year term for the gun use allegation on that count (R.T. 517). The court imposed a consecutive one-year term for each count on the remaining robbery counts (R.T. 517-18). On the kidnapping for robbery count, the court imposed a consecutive indeterminate term of seven years to life (R.T. 517).[2] The court stayed the sentences on the remaining gun use allegations and the assault count (R.T. 520). The court imposed a consecutive two-year term for the "out-on-bail" allegation (R.T. 518). The court indicated that it had imposed the consecutive sentences on the ground that the crimes involved planning, sophistication and professionalism (R.T. 518).

On appeal, Petitioner contended that his upper term and consecutive sentences violated Apprendi and Blakely. The Court of Appeal rejected Petitioner's contentions as barred by People v. Black, 35 Cal. 4th 1238, 29 Cal. Rptr. 3d 740, 113 P.3d 534 (2005), vacated, 549 U.S. 1190 (2007), abrogated, Cunningham v. California, 549 U.S. 270 (2007) ("Black") (see Pet. Ex. A). Black held that California's statutory scheme providing for the imposition of upper term and consecutive sentences did not violate the constitutional principles set forth in Blakely.

On January 22, 2007, the United States Supreme Court issued its decision in Cunningham, holding that a California judge's imposition

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[2] As indicated above, the Court of Appeal modified the sentence on the kidnapping for robbery count to a term of life with the possibility of parole.

of an upper term sentence based on facts found by the judge (other than the fact of a prior conviction) violated the constitutional principles set forth in Blakely. Cunningham expressly disapproved the contrary holding and reasoning of Black.

Petitioner raised a Cunningham claim in his Riverside Superior Court habeas petition (see Reply Ex. P; Respondent's Lodgment 1). The Superior Court rejected Petitioner's claim on the ground that Cunningham was not retroactive (see Pet. Ex. D). The Court of Appeal summarily rejected Petitioner's challenge to his sentence, and the California Supreme Court denied this claim without prejudice (see Pet. Exs. B, E, F). Therefore, the last reasoned state court opinion is the opinion of the Riverside County Superior Court, rejecting this claim on the ground that Cunningham assertedly was not retroactive.

In Butler v. Curry, 528 F.3d 624, 634-39 (9th Cir.), cert. denied, 129 S. Ct. 767 (2008), the Ninth Circuit held that Cunningham is retroactive. Because the Riverside Superior Court applied an incorrect legal standard, this Court's review is de novo. See Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc) ("we may not grant habeas relief simply because of § 2254(d)(1) error and . . . if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised"); Butler v. Curry, 528 F.3d at 641 (applying de novo review to Cunningham claim where Court of Appeal's application of Black was contrary to clearly established Supreme Court law); see also Panetti v. Quarterman, 551 U.S. 930, 127 S. Ct. 2842, 2855, 2858-59 (2007) (where state court's decision constituted an unreasonable application of Supreme Court law, review

of petitioner's claim is "unencumbered by the deference [section 2254(d)] normally requires").

B. Challenge to Upper Term Sentence

The sentencing court's imposition of an upper term sentence based on the court's finding that the offense involved "threat of great violence and bodily harm" violated Cunningham. Respondent does not contend otherwise, but argues that any error was harmless.

Blakely/Cunningham error is subject to harmless error analysis. See Washington v. Recuenco, 548 U.S. 212, 222 (2006); Butler v Curry, 528 F.3d at 648. Under the harmless error standard applicable in federal habeas cases, the Court must determine whether the error had a "substantial and injurious effect or influence" on Petitioner's sentence. See Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993); Butler v. Curry, 548 F.3d at 648.

Here, Petitioner did not dispute the prosecution's evidence concerning the kidnapping, robbery and assault of Milbes, but argued only that Petitioner did not commit kidnapping for robbery. As previously indicated, the jury found true the allegation that Petitioner had personally used a firearm in the commission of the Milbes robbery, the kidnapping for robbery, and the aggravated assault. The jury's finding of guilt on the assault charge indicates that the jury believed Milbes' testimony that Petitioner put the gun

to Milbes' head.[3] Given the jury's verdict and the evidence that Petitioner held the gun to Milbes' head and side and repeatedly threatened to shoot Milbes if Milbes did not cooperate, a rational jury could not have failed to find that the Milbes robbery involved a "threat of great violence and bodily harm" warranting the imposition of an upper term sentence. Therefore, any Cunningham error was harmless. See Aleman v. Clark, 2009 WL 1041520, at *11 (C.D. Cal. Apr. 16, 2009) (Cunningham error harmless, where there was "little doubt" that jury would have determined that robbery at gunpoint coupled with statement "Someone's gonna die" involved great violence or the threat of bodily harm); see also People v. Douglas, 36 Cal. App. 4th 1681, 1691-92, 43 Cal. Rptr. 2d 129 (1995) (finding that threatening robbery victim with a gun "clearly involved the threat of great bodily harm" sufficient to support upper term sentence); People v. Reid, 133 Cal. App. 3d 354, 369, 184 Cal. Rptr. 186 (1982) (upper term appropriate where defendant threatened to kill robbery victim).

C. Challenge to Consecutive Sentences

The United States Supreme Court's decision in Oregon v. Ice, 129 S. Ct. 711 (2009) forecloses Petitioner's claim that the imposition of consecutive sentences violated the principles set forth in Apprendi, Blakely and Cunningham. This Court must apply the majority opinion in Oregon v. Ice. See United States v. McCalla, 545 F.3d 750, 753 (9th Cir. 2008), cert. denied, 129 S. Ct. 1363 (2009) (lower federal court may not set aside or disregard United States Supreme Court precedent).

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[3] The prosecution's theory was that Petitioner committed assault by putting the gun to Petitioner's head (see R.T. 431).

Petitioner's reliance on the dissenting opinion in Oregon v. Ice (see Reply Mem., p. 9 & n.5) is unavailing. See United States v. Ameline, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005) (en banc) (Supreme Court dissenting opinions "of course[] are not precedential"). Therefore, Petitioner is not entitled to habeas relief on this claim.

II. Petitioner's Claims of Ineffective Assistance of Counsel Do Not Merit Habeas Relief.

Petitioner raised his claims of ineffective assistance of counsel in his state court habeas petitions (see Pet. Ex. J; Respondent's Lodgments 1, 2, 3). Because the state courts rejected these claims summarily, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d at 982.

A. Governing Legal Standards

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694, 697 (1984) ("Strickland"). A reasonable probability of a different result "is a probability sufficient to undermine confidence in the outcome." Id. at 694. The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not

prejudicial. Id. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted). For purposes of habeas review under 28 U.S.C. section 2254(d), Strickland sets forth clearly established Federal law as determined by the United States Supreme Court. See Williams v. Taylor, 529 U.S. at 391 (citation and quotations omitted).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. Williams v. Woodford, 384 F.3d 567, 610 (9th Cir. 2004), cert. denied, 546 U.S. 934 (2005) (quoting Strickland, 466 U.S. at 689). The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." Karis v. Calderon, 283 F.3d 1117, 1130 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003) (citation and quotations omitted); see Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). The test is "only whether some reasonable lawyer . . . could have acted, in the circumstances, as defense counsel acted." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.), rev'd on other grounds, 525 U.S. 141 (1998) (citations and quotations omitted); see also Babbitt v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998), cert. denied, 525 U.S. 1159 (1999) (relevant inquiry under Strickland is not what defense counsel could have

pursued, but rather whether the choices made by defense counsel were reasonable) (citation and quotations omitted). Petitioner bears the burden to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689 (citation and quotations omitted)

B. Counsel's Alleged Failure to Investigate and Present the Testimony of Omer Gilic

Petitioner contends counsel ineffectively failed to investigate the allegations of Omer Gilic (Pet. Mem., pp. 33-35; Reply Mem., pp. 12-13, 16-18). According to Petitioner, Gilic's testimony would have shown that Petitioner did not possess the requisite mental state to commit kidnapping for robbery (Pet. Mem., pp. 33-35).

Gilic's Declaration states that, sometime in the latter part of 2003, Milbes assertedly told Gilic that Milbes "had been the victim of an attempted robbery but . . . had out-smarted the robber" (Declaration of Omer Gilic, Pet. Ex. K ["Gilic Dec."], ¶ 2). Gilic relates that Milbes allegedly "stated this in a boastful manner and indicated that he quickly determined that the would-be robber was child-like and trusting so he [Milbes] decided to trick the robber, save his money and set a trap to capture the thief" (Gilic Dec., ¶ 3). According to Gilic, Milbes allegedly "appeared to be very proud of his trap to capture the robber and explained in detail how he made up a story about not having any cash other than what was in his wallet, although there was around $25,000 in the trunk of his car, and offered to buy jewelry at a jewelry store" (Gilic Dec., ¶ 4). Milbes

allegedly told Gilic that Milbes "knew that once he got the robber inside a jewelry store he [Milbes] would be safe because there would be other people around and security at this type of store [was] always high" (Gilic Dec., ¶ 5). Milbes allegedly told Gilic that the "trick worked," and "the robber accepted his [Milbes'] offer and Milbes drove the robber to what he [Milbes] described as 'his certain capture'" (Gilic Dec., ¶ 6). Milbes allegedly said Milbes "charmed the robber, gained his trust and stalled until he [Milbes] felt secure enough to make his move" (Gilic Dec., ¶ 7). Milbes allegedly told Gilic that Milbes "felt in control the whole time" and "was extremely proud that his [Milbes'] quickly-put-together plan succeeded so well" (Gilic Dec., ¶ 8). Gilic allegedly told Petitioner's father about Gilic's conversation with Milbes, and said Gilic would testify about the conversation with Milbes (Gilic Dec., ¶ 10). According to Gilic, no lawyer or investigator ever called or spoke with Gilic (R.T. 12).

At trial, Petitioner's counsel asked Milbes on cross-examination whether Milbes had ever told someone named "Omar" that Milbes was not afraid during the incident (R.T. 307). Milbes denied making this statement, saying he [Milbes] told "Omar" that in the beginning Milbes was afraid but that he began to relax a little in the car because Milbes assertedly knew that Petitioner would not shoot Milbes at least until after Petitioner "got what he wanted" (R.T. 308). It is unclear whether "Omar" was Omer Gilic. In any event, for the reasons discussed below, even assuming, arguendo, Petitioner's counsel unreasonably failed to investigate Gilic, Petitioner has not shown a reasonable probability of a different result had counsel investigated Gilic and called Gilic to testify.

Petitioner contends that Gilic's testimony assertedly would have impeached Milbes' testimony and "raised questions" regarding: (1) whether Petitioner purportedly acted under duress; and (2) whether the movement of Milbes substantially increased the risk of harm over and above that necessarily present in the Penny Mart parking lot (Pet. Mem., p. 35). Petitioner also contends Milbes assertedly tricked Petitioner into committing the kidnapping by leading Petitioner to believe Milbes voluntarily was taking Petitioner shopping, thereby allegedly inducing Petitioner to commit the crime (Pet. Mem., pp. 33-35).

Gilic's testimony would not have impeached to any significant extent Milbes' testimony concerning the events surrounding the kidnapping, robbery and assault. Gilic's testimony did not call into question Milbes' testimony concerning the sequence of events, including the taking of Milbes' money in the car and at the ATM, Milbes' long drive to the mall at gunpoint, Petitioner's repeated threats to shoot Milbes, and Petitioner's insistence on visiting multiple jewelry stores at the mall. Indeed, Gilic's testimony was largely consistent with that of Milbes. Milbes, a Palestinian, testified, among other things, that: (1) Milbes had learned in the Middle East how to react to violence; (2) Milbes lied to Petitioner in the car about having no more money; (3) Milbes was trying to play a role in order to keep Petitioner calm; (4) Milbes drove to the mall to find a jewelry store because Milbes thought there would be a lot of people in the mall and it would be a lot safer; (5) and Milbes told Petitioner that Milbes wanted to use the restroom because Milbes thought Milbes could get away from Petitioner or perhaps locate a

police officer (R.T. 289-92, 306-08, 312-13, 316-17). Milbes' testimony and Gilic's statement both show that, after the kidnapping had begun, Milbes was trying to keep Petitioner calm while Milbes looked for an opportunity to escape or for assistance. Gilic's statement does not suggest that Milbes influenced Petitioner to commit kidnapping.

Furthermore, Gilic's proposed testimony would not have shown Petitioner acted under duress. In California, duress can negate the intent or capacity to commit a crime. See People v. Petznick, 114 Cal. App. 4th 663, 676, 7 Cal. Rptr. 3d 726 (2003); Cal. Penal Code § 26. A person acts under duress when he or she has reasonable cause to believe, and does believe, that his or her life will be in "immediate and imminent danger" if he or she refuses to perform the allegedly compelled act. People v. Heath, 207 Cal. App. 3d 892, 900, 255 Cal. Rptr. 120 (1989) (citations omitted); Cal. Penal Code § 26, ¶ 6. Nothing in Gilic's proposed testimony would have suggested that Petitioner kidnapped Milbes because Petitioner reasonably believed Petitioner's life was in "immediate and imminent" danger. Nor would Gilic's testimony have supported a defense of entrapment. See People v. Serrata, 62 Cal. App. 3d 9, 25-26, 133 Cal. Rptr. 144 (1976) (defense of entrapment unavailable where person allegedly entrapping defendant was a private party, not a law enforcement officer); People v. Gregg, 5 Cal. App. 3d 502, 509, 85 Cal. Rptr. 273 (1970) (same).

Finally, nothing in Gilic's proposed testimony would have impugned trial proof of the "substantially increased risk of harm" element of the crime of kidnapping for robbery. "Kidnapping for

robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself." People v. Rayford, 9 Cal. 4th 1, 11, 36 Cal. Rptr. 2d 317, 884 P.2d 1369 (1994) (citation and internal quotations omitted). Testimony that Milbes purportedly conceived a plan to "charm" or "trick" Petitioner into going to a jewelry store to facilitate Petitioner's apprehension would not have detracted from the compelling evidence of a "substantially increased risk of harm" resulting from Petitioner having forced Milbes to drive for a considerable period of time at gunpoint. See People v. Sanford, 63 Cal. App. 3d 952, 959, 134 Cal. Rptr. 155 (1976), cert. denied, 431 U.S. 969 (1977) ("The 'risk of harm' test is satisfied when the victim is forced to travel a substantial distance under a threat of imminent injury by a deadly weapon.") (citations omitted); People v. Daniels, 202 Cal. App. 3d 671, 683-84, 248 Cal. Rptr. 753 (1988) (forcing victim to drive to shopping mall at gunpoint and poking victim in the head with the gun showed substantial risk of harm to victim over and above that necessarily present in the crime of robbery, even though gun later was shown to be unloaded).

For all of these reasons, Petitioner has not shown a reasonable probability of a different result if Gilic had testified in the manner alleged by Petitioner, and hence has not shown Strickland prejudice.

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C. **Counsel's Failure to Request a Voluntary Intoxication Instruction**

Although California has abolished the diminished capacity defense, evidence of voluntary intoxication remains relevant "to the extent it bears upon the question whether the defendant *actually* had the requisite specific mental state required for commission of the crimes at issue." People v. Horton, 11 Cal. 4th 1068, 1119, 47 Cal. Rptr. 2d 516, 906 P.2d 478 (1995), cert. denied, 519 U.S. 815 (1996) (citation omitted; original emphasis). A defendant is entitled to a voluntary intoxication instruction "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.'" People v. Williams, 16 Cal. 4th 635, 677, 66 Cal. Rptr. 2d 573, 941 P.2d 752 (1997), cert. denied, 523 U.S. 1027 (1998) (citation omitted). A voluntary intoxication instruction is not required unless there is evidence to show that the defendant "became intoxicated to the point he failed to form the requisite intent." People v. Ivans, 2 Cal. App. 4th 1654, 1661, 4 Cal. Rptr. 2d 66 (1992).

The only evidence at trial concerning Petitioner's possible voluntary intoxication was Milbes' testimony that Petitioner appeared to be under the influence of something (R.T. 311). However, Milbes said he reached this conclusion not from Petitioner's speech, but "just from looking" (R.T. 311). Milbes explained: "People don't just rob people. I'm thinking maybe the guy is on something, you know, to make some stupid decision like that" (R.T. 311). Thus, Milbes inferred Petitioner was under the influence only because, in Milbes'

mind, sober people would not commit such a "stupid" robbery. There was no trial evidence that Petitioner had ingested any drugs or alcohol prior to the incident, and certainly no evidence that Petitioner was so intoxicated that he was unable to form the intent to commit kidnapping for robbery. Counsel reasonably could have concluded that requesting a voluntary intoxication instruction would be futile. Strickland does not require an attorney to make a futile motion. See Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996), cert. denied, 519 U.S. 1142 (1997) ("the failure to take a futile action can never be deficient performance"). For the same reason, Petitioner has not shown that counsel's failure to request a voluntary intoxication instruction prejudiced Petitioner. Given the state of the evidence, the trial court would have denied any such request.[4]

D. Counsel's Failure to Present Alleged Evidence of Asserted Voluntary Intoxication

Petitioner alleges that his asserted voluntary intoxication at the time of the kidnapping allegedly "may have prevented" Petitioner from forming the requisite intent to commit the crime (Pet. Mem., pp. 33-34). Petitioner contends his trial counsel unreasonably failed to present the testimony of medical experts concerning the alleged voluntary intoxication (Pet. Mem., pp. 41-42). Petitioner relies on Milbes' testimony, the declaration of John C. Hiserodt, dated August 30, 2007, and the declaration of attorney Douglas Bader, dated

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[4] To the extent Petitioner contends counsel failed to introduce evidence sufficient to support such an instruction, the Court addresses that issue below.

December 13, 2007 (Pet. Exs. M, N).

In Dr. Hiserodt's declaration, Dr. Hiserodt opines that on the day of the kidnapping Petitioner assertedly was under the influence of "multiple drugs including marijuana and amphetamine during the time period in which he [Petitioner] was involved in the robbery and subsequent events," which assertedly "significantly contributed to his confusion and poor judgement [sic] related to the crime" (Pet. Ex. M). According to Dr. Hiserodt, an ambulance report on May 31, 2003 indicated that Petitioner had a fast heartbeat, high blood pressure, and elevated cardiac enzymes, and that Petitioner was sweating profusely and confused (Pet. Ex. M). A urine drug screen allegedly showed positive for marijuana and amphetamine (Pet. Ex. M). Petitioner allegedly told medical staff that Petitioner had taken "speed" (Pet. Ex. M). Over the next 24 hours, Petitioner's cardiac enzymes assertedly returned to normal levels, and his heart rate and blood pressure assertedly returned to normal levels consistent with the "known half-life of amphetamine" (Pet. Ex. M). Dr. Hiserodt opines that Petitioner's physical symptoms assertedly were consistent with "amphetamine overdose," and that it is "likely that the psychological effects including confusion and impaired judgement [sic] were at play in the commitment of the robbery and the events following the robbery" (Pet. Ex. M).

In his declaration, attorney Bader opines that Petitioner's trial counsel should have obtained an expert to interpret the results of Petitioner's blood tests on the day of his arrest, and should have presented a medical doctor or chemical expert as a defense witness at

trial (Pet. Ex. N).

Assuming, arguendo, that Petitioner's counsel unreasonably failed to investigate a voluntary intoxication defense and/or unreasonably failed to obtain medical experts regarding such a defense, Petitioner has failed to show resulting Strickland prejudice.

Dr. Hiserodt's declaration and the records described therein do not show that, at the time of the kidnapping incident, Petitioner was so intoxicated that he was unable to form the requisite specific intent. At best, this alleged evidence shows only that Petitioner assertedly had ingested marijuana and amphetamine at some point prior to Petitioner's apprehension at the mall, and that it was "likely" that Petitioner suffered from "confusion" and "poor judgment" due to the ingestion of amphetamine. Dr. Hiserodt did not opine that Petitioner's alleged condition was such that Petitioner was incapable of forming an intent to kidnap Milbes for the purpose of robbing Milbes.

Moreover, the trial evidence belies any assertion that any alleged "confusion" and "lack of judgment" rendered Petitioner incapable of forming the intent to kidnap Milbes for the purpose of robbery. Milbes' testimony showed that Petitioner was articulate and aware throughout the incident, and deliberately intended to kidnap Milbes in order to take Milbes' money. Petitioner demanded money and expressed dissatisfaction with the contents of Milbes' wallet. Petitioner indicated that he had followed Milbes and knew Milbes had visited a bank. Petitioner entered Milbes' car, pointed a gun at

Milbes, threatened to shoot Milbes, and told Milbes to drive to an ATM. When Petitioner saw that the Washington Mutual Bank was busy, Petitioner told Milbes to find a Bank of America. When Milbes said he could not remember his credit card PIN numbers, Petitioner told Milbes to find a jewelry store. At the mall, Petitioner went from store to store in order to locate jewelry to his liking. These were hardly the words and actions of one so profoundly under the influence of drugs as to be incapable of forming the intent to kidnap Milbes for the purpose of robbing him.

In light of Milbes' testimony concerning Petitioner's words and actions during the incident, Dr. Hiserodt's opinion that it was "likely" that drugs caused Petitioner's supposed "confusion" and "poor judgment" would not have persuaded anyone that Petitioner lacked the capacity to form the intent to kidnap Milbes for the purpose of robbery. Petitioner has not shown a reasonable probability that, had counsel investigated a voluntary intoxication defense and called Dr. Hiserodt as a witness, the result would have been different.

Petitioner also faults his counsel for failing to present alleged mitigating evidence at sentencing (Pet. Mem., p. 44). Petitioner alleges that, at sentencing, Petitioner's counsel alluded to "what drugs do to a young man," but assertedly failed to investigate "how this [i.e., drug use] may be relevant to the sentencing proceedings" (Pet. Mem., p. 44). Petitioner otherwise does not identify what evidence Petitioner asserts counsel should have presented at sentencing. In his California Supreme Court habeas petition, to which Petitioner refers in the present Petition (see Pet. Mem., p. 44),

Petitioner alleged that he committed the March robberies while "in a state of drug induced delirium," and that his counsel assertedly knew "that the events at issue here were the result of drug-induced psychosis resulting from a methamphetamine binge" (see Pet. Ex. J, p. 34).

The record contains no evidence even arguably supporting these assertions other than the declaration of Dr. Hiserodt, discussed above, and a letter from an intake coordinator of a residential educational organization for former alcoholics, attached to attorney Bader's declaration and dated June 17, 2004, indicating that the organization tentatively had accepted Petitioner for entry into the program (see Pet. Ex. N, exhibit). Dr. Hiserodt's declaration and the medical records to which the declaration refers do not show that Petitioner suffered from any "delirium" or "drug induced psychosis" when he committed the crimes. Indeed, neither Dr. Hiserodt's declaration nor the alleged medical records mentioned therein state any facts or conclusions with respect to the March robberies. The allegation that a residential center for recovering alcoholics offered Petitioner a placement over a year after Petitioner's crimes does not support Petitioner's argument that Petitioner committed his crimes while suffering from an alleged drug-induced "delirium" or "psychosis." Furthermore, as indicated above, the trial evidence showed Petitioner was lucid and articulate when he kidnapped Milbes to rob him. In these circumstances, Petitioner has not shown that counsel's alleged failure to present asserted mitigating evidence prejudiced Petitioner within the meaning of Strickland.

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E. Counsel's Failure to Present an Opening Statement

At the start of trial, Petitioner's trial counsel reserved opening statement (R.T. 16). At the start of the defense case, Petitioner's counsel elected not to make an opening statement (R.T. 380). Petitioner alleges that trial counsel failed to make an opening statement "outlining the defense strategy because he [counsel] had developed no strategy for the defense" (Pet. Mem., pp. 42-43).

"The timing of an opening statement, and even the decision whether to make one at all, is ordinarily a mere matter of trial tactics and in such cases will not constitute the incompetence basis for a claim of ineffective assistance of counsel." United States v. Rodriguez-Ramirez, 777 F.2d 454, 458 (9th Cir. 1984); see also LaGrand v. Stewart, 133 F.3d 1253, 1275 (9th Cir.), cert. denied, 525 U.S. 971 (1998). "It is well-settled that the decision to waive an opening or closing statement is a commonly adopted strategy, and without more, does not constitute ineffective assistance of counsel." Fox v. Ward, 200 F.3d 1286, 1296 (10th Cir.), cert. denied, 531 U.S. 938 (2000).

The record shows that the strategy of Petitioner's counsel was to concede the robberies but to contest (successfully as it turned out) the firearm use allegations with respect to the March robberies, and to argue that Petitioner did not commit aggravated kidnapping. Petitioner does not allege any facts showing why counsel's decision to waive opening statement was unreasonable, or how that decision harmed Petitioner. Therefore, Petitioner has shown neither counsel's unreasonableness nor any prejudice resulting therefrom.

F. Counsel's Alleged Concession of Guilt on the Robbery Charges Without Consulting Petitioner

As previously noted, in closing argument Petitioner's counsel conceded Petitioner's guilt on the robbery charges (R.T. 433-35). Petitioner contends that his counsel ineffectively did so without consulting Petitioner (Pet. Mem., p. 43). In Florida v. Nixon, 543 U.S. 175 (2004), the Supreme Court indicated that defense counsel has an obligation to explain to the defendant counsel's proposed strategy of conceding guilt at the guilt phase of a capital trial, but has no additional obligation to obtain the defendant's express consent to this strategy. Id. at 189. Here, assuming arguendo that counsel ineffectively failed to consult with Petitioner as Petitioner alleges, see United States v. Thomas, 417 F.3d 1053, 1056 (9th Cir. 2005), cert. denied, 546 U.S. 1121 (2006) (making similar assumption), Petitioner has not shown a reasonable probability that a different strategy would have produced a different result. As discussed previously, the prosecution introduced surveillance videotapes of the March robberies and Petitioner's admission to police that he committed those robberies. The evidence was also overwhelming that Petitioner committed the Milbes robbery (Petitioner was apprehended, after the struggle for the gun in the mall, in possession of Milbes' $700).[5] On such a record, Petitioner has not shown Strickland prejudice. See

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[5] Petitioner argues that his counsel should have investigated whether Petitioner had the requisite state of mind for kidnapping for robbery (see Pet. Mem., pp. 33-35). However, the evidence or other facts outside the record would not have given counsel any reasonable ground to contest the prosecution's evidence that Petitioner committed the Milbes robbery.

United States v. Thomas, 417 F.3d at 1059 (counsel's concession of guilt not prejudicial given strength of prosecution's evidence); Haynes v. Cain, 298 F.3d 375, 382-83 (5th Cir.), cert. denied, 537 U.S. 1072 (2002) (counsel's failure to obtain defendant's consent before conceding guilt not prejudicial where prosecution presented "nearly conclusive" evidence of guilt).

G. Conclusion

For all of the foregoing reasons, the state courts' rejection of Petitioner's claims of ineffective assistance of counsel was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d). Petitioner is not entitled to habeas relief on these claims.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: June 26, 2009.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.